

1985

Report to the Governor and to the Legislature

Office of Administrative Hearings

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**OFFICE OF
ADMINISTRATIVE HEARINGS**

Report to the Governor
and to the Legislature



**State of California
George Deukmejian
Governor**

1985

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STATE OF CALIFORNIA

GEORGE DEUKMEJIAN
Governor

STATE AND CONSUMER SERVICES AGENCY

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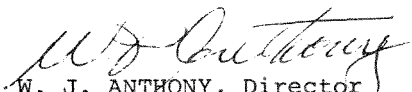
HONORABLE GEORGE DEUKMEJIAN
Governor, State of California

and

MEMBERS OF THE LEGISLATURE

This report is mandated¹ to describe developments in administrative law affecting the Office of Administrative Hearings and to make recommendations which promote fairness, uniformity and expedition of government's business. Three new laws are proposed which meet those goals while reducing the cost of government.

Topics discussed include automation, electronic recording of hearings, Department of Developmental Services hearings, proposed legislation, enactment of regulations, statewide conference of administrative law judges and hearing officers, and arbitration of construction contract disputes.


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1. Government Code Section 11370.5

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I. AUTOMATION

A. BACKGROUND

In April, 1984, the Office of Administrative Hearings (OAH) requested that a study be conducted to explore the use of automated equipment, particularly microcomputers and word processors, to perform tasks currently performed manually by OAH staff. OAH's study request was referred to the Department of General Services' Office of Management Technology and Planning (OMTP), and the Director of OAH selected a committee of six staff members to develop a 5-year Management Information Systems Plan. The Committee on Office Automation (COA) met for the first time on May 7-8, 1984, and set November 30, 1984 as the target date for completion of the plan.

B. OBJECTIVES

The COA agreed upon the following objectives:

1. Examine current office processes and identify those areas that may be improved through the utilization of office automation.
 - a. Obtain officewide participation in identification of needs.
 - b. Identify new applications only available through office automation.
2. Develop a long-range information systems plan which establishes priorities for implementation.

C. METHODOLOGY

OMTP has performed information systems planning studies for a number of State departments over the past two years, including the Department of Forestry, Air Resources Board, State Lands Commission, and California State Library. The process for these studies is the Business Systems Planning (BSP) method first developed by IBM and modified by OMTP for use by State agencies. Due to the size of OAH and the nature of its workload, OMTP scaled down this process to meet OAH's needs.

The heart of the BSP planning methodology is a needs assessment to determine all potential applications where information technology can provide work improvements. The COA conducted 18 individual interviews with administrative law judges, hearing officers, administrative staff and clerical support staff in order to determine possible automation needs.

D. IDENTIFIED NEEDS

Based upon the information gathered in discussion with OAH staff, the COA identified the following potential automated systems applications:

1. Decision Preparation
2. Case Tracking
3. Billing and Timekeeping
4. Hearing Transcription

Management studies were completed for all proposed applications in order to address specific problems, potential solutions, possible hardware/software needs, and expected benefits.

E. COSTS/BENEFITS

The costs of implementing the proposed OAH systems over a five-year period are estimated to be \$322,455. OAH anticipates both hard and "soft" dollar savings as a result of obtaining automated equipment to address its identified needs.

With the Decision Preparation System, OAH estimates that over \$325,000 will be saved over a 5-year period in clerical staff time and in reduced decision-writing time for professional staff. Future clerical staff increases can also be avoided if a word processing system is implemented. In addition, OAH will experience a significant improvement in the appearance of the final decisions and proposed decisions prepared by OAH clerical staff.

Through implementation of the Timekeeping and Billing System, OAH expects to achieve savings of over \$12,000 over a 5-year period as a result of not having to update the current data processing system. Furthermore, OAH will be able to bill clients on a more timely basis, thus reducing its accounts receivable and permitting a reduction in OAH's hourly billing rates to client state agencies.

As with the Timekeeping and Billing System, the Case Tracking System will allow an improved level of service to client state agencies by permitting the storage, manipulation and retrieval of relevant case and billing information.

The Hearing Transcription System is expected to save client state agencies over \$620,000 in transcript costs over a 5-year period. By implementing a system of computer-aided transcription, OAH hearing reporters will be able to prepare transcripts on a more timely basis and at a cost comparable to the private sector.

Overall, the expected net benefits for all systems over a 5-year period would be nearly \$650,000.

F. IMPLEMENTATION PLAN

OAH has determined that the implementation of its Decision Preparation System is its first priority. Funding is expected to become available in Fiscal Year 1985-86, and OAH plans to acquire word processing equipment for the Decision Preparation System by August, 1985 to be operational by November, 1985. As soon as the Decision Preparation System is operational, OAH will implement its Case Tracking and Billing/Timekeeping Systems.

In addition to the above, OAH will begin the development of personal dictionaries for Hearing Reporter staff in Fiscal Year 1985-86. After funds become available in Fiscal Year 1985-86, OAH will lease one computer-aided transcription editing terminal for its Los Angeles office in order to assess the cost-effectiveness of such equipment.

G. STAFFING REQUIREMENTS

OAH plans to implement all proposed systems with existing staff resources. OAH will require the assistance of OMTP personnel to aid in the hardware acquisition, software evaluation and actual system implementation. Once the system is fully operational, OAH will manage the system.

H. FUNDING PROPOSAL

The Department of General Services approved OAH's office automation concept and will submit a budget change proposal for a fiscal year 1985-86 augmentation to the Department of Finance in February, 1985, requesting its approval and transmission of a finance letter to the Legislature. The objective of this augmentation will be to acquire automated equipment as determined by the Management Information Systems Plan.

II. ELECTRONIC RECORDING OF HEARINGS

In prior Reports the Office of Administrative Hearings (OAH) urged the Legislature to amend Government Code § 11512(d) so as to permit Administrative Procedure Act (APA) proceedings to be electronically recorded, rather than to require them to be reported solely by a phonographic (or stenographic) reporter. Previous attempts by OAH to record hearings electronically by means of securing waivers from both parties proved unworkable when the parties failed to waive the phonographic reporter requirement with any frequency. After OAH initiated an unsuccessful lawsuit for declaratory relief in an effort to avoid the necessity of obtaining waivers, the Office of the Attorney General ruled on December 31, 1982 that OAH was completely precluded from using electronic recording equipment, even if the parties purported to waive the requirement of a phonographic reporter (65 Cal. Ops. Atty. Gen. 682).

In 1983 the Legislature enacted AB2034 (Ch. 635, Stats. 1983) which amended Government Code § 11512(d) by explicitly permitting APA proceedings to be reported electronically upon consent of all parties. On May 22, 1984 OAH implemented an electronic recording program in its San Francisco office on a voluntary basis. After six months of operation, the program has met all of OAH's expectations. Seventy-one different cases were recorded, with a trained OAH employee monitoring the proceedings, running virtually the entire gamut of APA hearings. Only cases involving panels or multiple parties (insufficient microphone capabilities) or which involve standing orders for a transcript on an expedited basis (insufficient time) were not recorded. No party failed to waive the reporter requirement. The equipment failed on only one occasion and was fully repaired by the next day. Individual tapes were reproduced upon request in three cases; the duplication for each tape only took several minutes and cost a nominal fee. Transcripts were prepared in three other cases upon request without any problem.

The San Francisco Office of the Attorney General, which represents many of the State agencies appearing before OAH's San Francisco office in APA proceedings, has now approved waiver forms on behalf of those agencies and is transmitting them at the same time pleadings are served upon respondents. Completion of these waiver forms by respondents will permit OAH to continue to calendar future cases for electronic recording in an efficient manner. OAH expects to extend the electronic reporting program to include its Los Angeles office by March, 1985.

III. DEPARTMENT OF DEVELOPMENTAL SERVICES HEARINGS

The Office of Administrative Hearings (OAH) maintains a Special Hearing Unit in Sacramento consisting of seven hearing officers who conduct certain types of non-Administrative Procedure Act hearings. Since October, 1983 the Special Hearing Unit has been conducting state level fair hearings for the Department of Developmental Services (DDS) under the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code § 4500 et seq.). The parties involved in these hearings are a claimant (an applicant for or recipient of services from a service agency) or his or her authorized representative and a service agency (state hospital or regional center). A claimant may file for a fair hearing whenever he or she "is dissatisfied with any decision or action of the service agency which he or she believes to be illegal, discriminatory, or not in the (claimant's) best interest" (Welfare and Institutions Code § 4710.5(a)). Two types of issues occur in these cases: eligibility for services from a service agency and a reduction or change in the types of services received by a claimant.

A claimant or authorized representative who disagrees with a decision of the service agency director (informal appeal) may obtain a state level fair hearing by submitting a written request to the service agency within ten days of the director's decision. This is to be forwarded immediately to DDS, which in turn forwards the request to OAH for calendaring. The case must be set for hearing within 20 days of receipt of the request by DDS (a continuance of up to 10 days may be granted by OAH for good cause). After hearing, a final decision must be prepared and sent within ten days.

During the first twelve months of conducting these hearings, OAH received 783 appeals. OAH conducted 601 hearings and issued 567 written decisions (34 matters were pending decisions). Special problems caused by these types of hearings include extremely short timelines for calendaring and deciding cases, lack of pleadings, and dealing continuously with unrepresented parties.

IV. PROPOSED LEGISLATION

As part of its continuing study in the field of administrative law the Office of Administrative Hearings (OAH) submits the following three legislative proposals. These suggestions are offered to promote fairness and uniformity. The topics include subpoenas for witnesses at administrative hearings, extension of lay-off date for permanent and probationary school employees when a continuance is granted, and changing the title of OAH hearing officers to administrative law judges. Suggested language for the first two proposals is included with the text. Suggested language for the third proposal has been drafted by OAH and is available but is not reproduced in this Report because of its voluminous nature.

In addition, OAH has identified a fourth problem area which it believes the Legislature should examine—payment of costs for tenured teacher dismissal or suspension hearings. However, OAH is not proposing any specific solution or language at this time.

SUBPOENAS FOR WITNESSES AT ADMINISTRATIVE HEARINGS

A. PROBLEM

The Administrative Procedure Act (APA) has contained language since 1945 authorizing the issuance of subpoenas under circumstances consistent with the provisions set forth in the Code of Civil Procedure (CCP). The current subpoena language in the Government Code governing hearings conducted by the Office of Administrative Hearings (OAH) has not been revised since 1968, however, while the applicable CCP subpoena provisions have been amended twice since then, in 1980 and 1981. As a result, the language in CCP § 1989 controlling the geographic area in which a witness must reside before he or she can be subpoenaed in a judicial matter is now broader than the language in Government Code § 11510 governing appearances at APA administrative hearings. The Government Code language should be reconciled with criteria set forth in the CCP in order to eliminate confusion and to ensure fairness and uniformity.

B. PROPOSED SOLUTION

OAH recommends amending Government Code § 11510(b) to eliminate the existing 150 mile restriction on compelling attendance to a hearing by subpoena and replacing the language with the requirement found in CCP § 1989 that the witness need only be a resident within the State at the time of service of the subpoena. The 150 mile restriction existed in the CCP from 1958-1980. In 1981 the limit was raised to 500 miles. Since 1982 a witness need only reside within California when served with a subpoena to be obliged to attend a proceeding before any court. This broad requirement permits a party to compel attendance of anyone residing within the State and ensures that the proceeding will be as fair as possible.

If Government Code § 11510(b) is left unchanged, parties will continue to be confused by the differing requirements for subpoenas. While there is currently a procedure to compel attendance of a witness at an APA hearing, regardless of where he or she resides within California, that process is unduly cumbersome compared to judicial proceedings (an affidavit must be filed showing the testimony of the desired witness is material and necessary).

C. SUGGESTED LANGUAGE

Amend § 11510(b) of the Government Code to read as follows:

11510(b). The process issued pursuant to subdivision (a) shall be extended to all parts of the state and shall be served in accordance with the provisions of Sections 1987 and 1988 of the Code of Civil Procedure. No witness shall be obliged to attend at a place out of the county in which he resides unless the distance be less than 150 miles from his place of residence except that the agency, upon affidavit of any party showing that the testimony of such witness is material and necessary, may endorse on the subpoena an order requiring the attendance of such witness, unless the witness is a resident within the state at the time of service.

EXTENTION OF LAYOFF DATE FOR PERMANENT AND PROBATIONARY SCHOOL EMPLOYEES WHEN A CONTINUANCE IS GRANTED

A. PROBLEM

Education Code § 44955 sets forth the various grounds under which the governing board of a school district may reduce the number of its permanent or probationary certificated employees (e.g. a decline in average daily attendance; a reduction or discontinuance of a particular kind of service). For any such reduction the governing board must follow the procedures set forth in Education Code § 44949. Those procedures include written notice to the affected employee no later than March 15th, advising him or her that termination has been recommended and stating the reasons why.

After a hearing is requested, a continuance may be granted in accordance with Government Code § 11524. If there is a continuance, certain dates set forth in Education Code § 44949(c), including the May 7th date for issuing the proposed decision, are extended for the same period of time as the continuance (§ 44949(e)). However, no provision is made for extending the May 15th deadline set forth in Education Code § 44955(c). Statutory changes implemented by Chapter 498, Statutes 1983 created this discrepancy.

B. PROPOSED SOLUTION

Education Code § 44949(e), which extends certain time deadlines when a continuance is granted, should be technically amended to include a reference to § 44955(c). This would avoid the anomaly of an OAH administrative law judge having the May 7th deadline for submitting a proposed decision to the governing board extended to May 15th or beyond without the governing board receiving a similar extension of time to make its final decision.

C. SUGGESTED LANGUAGE

Amend Section 44949(e) of the Education Code to read as follows:
44949(e). If after request for hearing pursuant to subdivision (b) any continuance is granted pursuant to Government Code Section 11524, the dates prescribed in subdivision (c) which occur on or after the date of granting the continuance *and the date prescribed in Section 44955(c) which occurs after the date of granting the continuance* shall be extended for a period of time equal to such continuance.

CHANGING TITLE OF OFFICE OF ADMINISTRATIVE HEARINGS' HEARING OFFICERS TO ADMINISTRATIVE LAW JUDGE

A. PROBLEM

The Office of Administrative Hearings' (OAH) administrative law judges (ALJs) conduct proceedings under the Administrative Procedure Act (APA). The APA, however, refers to OAH ALJs as "hearing officers" because the term "hearing officer" was the original working title for OAH ALJs and because the APA has not been changed since 1975 to reflect the new ALJ designation adopted that year. The term "hearing officer" is often misleading. Laypersons and even lawyers frequently believe a hearing officer is an employee of the State agency aligned against them. Due process of law requires that an impartial, fair and independent hearing be given parties to administrative hearings. The term "judge" connotes such impartiality, fairness, and independence. Use of that title would reassure unrepresented laypersons, instill confidence in lawyers and bring greater cooperation from attorneys appearing in Administrative Procedure Act proceedings.

OAH's ALJs hear more types of cases for a greater number of agencies than any other comparable class in State service. OAH ALJs are authorized to hear cases for over 50 State agencies, as well as for cities, counties and school districts.

B. PROPOSED SOLUTION

The Government Code should be technically amended to change references from "hearing officer" to "administrative law judge" for Administrative Procedure Act proceedings. Related references should be similarly changed in the Code of Civil Procedure, Education Code and the Government Code. Such reference changes would also conform the Codes to current usage, as the description "administrative law judge" has been the working title of OAH hearing officers conducting Administrative Procedure Act proceedings since 1975.

Similar statutory titular changes for unemployment insurance referees were implemented, without controversy, during the past legislative session (Chapter 537, Statutes 1984).

PAYMENT OF COSTS FOR TENURED TEACHER DISMISSAL OR SUSPENSION HEARINGS

When tenured teachers are dismissed, it must be for cause. They may also be suspended without pay for a specific period of time on grounds of unprofessional conduct. In either case they have a right to a hearing, if requested, before a three member Commission on Professional Competence headed by an Office of Administrative Hearings (OAH) hearing officer. If the teacher is not dismissed or suspended as the result of the hearing, the employee pays no expenses of the hearing and is entitled to recovery of reasonable attorney fees as well (Education Code § 44944(e)).

Education Code § 44944(e) further requires a teacher to pay one half the expenses of that hearing, including the costs of OAH's hearing officer, if the Commission on Professional Competence subsequently upholds that teacher's dismissal or suspension from employment. Based on OAH's experience over the past few years, approximately one half of the teacher dismissals or suspensions are sustained after hearing. In many of these cases, the dismissed or suspended teacher is unable or unwilling to pay the required share of the expenses.

Hearings on dismissal actions taken against probationary school employees are currently funded entirely by the affected school districts. Also, hearings on appeals by licensees from disciplinary actions taken by State regulatory agencies are funded entirely by those agencies. It is not fair for tenured teachers to be singled out when no other group pays for the costs of a disciplinary hearing.

The present procedure is also unfair to other governmental agencies. Because OAH must set its rates so as to recover all of its costs, all other governmental agencies utilizing OAH's services are being charged a higher rate due to the unpaid teacher billings. As of June 30, 1984 those unpaid billings totaled \$175,585.23.

Although OAH has not submitted a legislative proposal at this time, we believe the Legislature should consider addressing this problem.

V. ENACTMENT OF REGULATIONS

Since the last Report submitted by the Office of Administrative Hearings (OAH) in 1983, OAH has enacted two sets of regulations and been actively involved in the formulation of a third set of regulations, all located in Title 1 of the California Administrative Code. Child care contractor regulations implementing Ch. 1061, Stats. 1981 are now found in § 201-207. Health and Welfare Agency non-profit human services contractor regulations implementing Ch. 1373, Stats. 1982 are now located in § 251-259. Finally, revised public works contract arbitration regulations, jointly promulgated by the Departments of General Services, Transportation and Water Resources but administered by OAH, are set forth in § 300-393 (non-consecutive).

VI. STATEWIDE CONFERENCE OF ADMINISTRATIVE LAW JUDGES AND HEARING OFFICERS

The Office of Administrative Hearings (OAH) sponsored a statewide conference in Sacramento on October 24-26, 1984 for all of its administrative law judges and hearing officers. This was the first such conference ever held for the hearing officers and the first statewide OAH ALJ meeting in many years. Topics of interest were presented by OAH staff, other invited state employees and private individuals. Because of the great success of this conference, OAH is exploring the possibility of conducting such an event on an annual basis, perhaps in conjunction with the State Bar convention.

VII. ARBITRATION OF CONSTRUCTION CONTRACT DISPUTES

The Office of Administrative Hearings (OAH) has previously described the progress of this program in its 1981 and 1983 Reports to the Governor and the Legislature. Since over five years have now passed since the first demand for arbitration was filed with OAH, we believe a more detailed analysis of the program is warranted at this time. In OAH's 1981 report we indicated that arbitration of construction disputes was aimed at diverting contract cases, which often require protracted litigation, from the court system, thereby reducing court congestion. This has in fact occurred, albeit without as great a volume of filings as one might expect. OAH also concludes that the arbitration process itself has provided a quicker and more economical way than litigation to resolve construction contract disputes.

To recapitulate briefly the past history of the program, former Governor Brown issued Executive Order B 50-78 on December 8, 1978. That Order established a State Construction Contract Arbitration Program to resolve construction disputes between contractors and the Departments of General Services, Transportation, or Water Resources under the State Contract Act. The Executive Order was issued in response to an appellate court decision in the *Zurn* case (*Zurn Engineers v. State of California*, 69 CA 3d 798 (1977)) and to the enactment of Civil Code § 1670. *Zurn* held that a trial court is limited in its scope of review of a public agency's final administrative decision (by the Chief Engineer, for example) if a contractor had agreed in the contract to permit the public agency to make the final decision in contract disputes. As a result a trial court could not substitute its judgment for the judgment of the Chief Engineer. In response to the *Zurn* decision, the Legislature enacted Civil Code § 1670 (Ch. 1374, Stats. 1978), which permitted construction contract disputes to be submitted to independent arbitration, if mutually agreeable, and otherwise to litigation.

The Executive Order required all construction contracts by the Departments of General Services, Transportation, and Water Resources issued under the State Contract Act, for which bids were opened between January 1, 1979 and December 31, 1983, to contain a clause requiring disputes to be submitted to arbitration. OAH was appointed to administer the arbitration program. Other State and local agencies were encouraged to utilize the program on a voluntary basis. The Departments of General Services, Transportation, and Water Resources were directed to and did jointly adopt regulations governing the program, effective July 1, 1979.

The Executive Order also authorized creation of an Arbitration Committee to oversee the program, consisting of three members from the construction industry and one member from each of the three State agencies. The Director of OAH participates as a seventh non-voting member. The Committee establishes policy, comments on regulations proposed by the three State agencies, establishes criteria for the certification of arbitrators, reviews the qualifications of applicants who wish to be arbitrators, and certifies those applicants who are qualified.

Most of the Executive Order was codified by the Legislature in Government Code § 14410 et seq. (Ch. 769, Stats. 1981).¹ The following year the language was transferred without change to Public Contract Code § 10240 et seq. (Ch. 466, Stats. 1982). Authorization for the Arbitration Committee was also codified at the same time in Government Code § 14415 et seq. and similarly transferred without change to Public Contract Code § 10245 et seq. Qualifications for the Committee members were changed slightly and set forth in greater detail in the statute. With the enactment of these sections, the determination of rights provisions for hearings before OAH on claims of \$50,000 or less formerly found in Government Code §§ 14378–14380 were repealed. The regulations enacted to implement the determination of rights program, formerly found in Title 1, Cal. Admin. Code §§ 201–233, were repealed by OAH to conform with the legislation.

Public Contract Code § 10240.5 provides that the arbitration rules in effect at the time of the codification governed until initial uniform regulations under the statute were adopted. The three State agencies promulgated such initial uniform regulations effective May 7, 1984. The regulations are set forth in Title 1, Cal. Admin. Code, § 300 et seq. The principal change added by the new regulations is a simplified procedure for claims totaling less than \$50,000. The Public Contract Code and the new regulations are now the applicable law governing the arbitration program, as the Executive Order expired by its own terms after December 31, 1983.

There have been 312 applicants to be arbitrators for the program. Of these, 159 (or just over 50%) have been certified and have indicated they are available to participate in the program at this time (additional individuals have been certified in the past but after annual inquiry have removed themselves from consideration). About 25% of the arbitrators are trained in more than one occupation. The current panel consists of 95 attorneys (60%), 33 contractors (20%), 61 engineers (40%), 5 architects (3%), and 3 others (2%). Their average hourly fee for arbitration is: attorneys—\$113.63, contractors—\$80.76, engineers—\$77.95, architects—\$62, and others—\$50. The fees range from \$25/hr to \$190/hr.

Through November, 1984 there have been 109 demands for arbitration. The total by calendar year is: 1979—7, 1980—10, 1981—21, 1982—24, 1983—23, 1984—24. Of these cases, 69 have been filed against the Department of Transportation (63%), 29 against the Department of General Services, Office of State Architect (27%), 2 against the Department of Water Resources (2%), 1 against the Department of Corrections (1%), and 8 against various local agencies (7%). The amounts claimed have ranged from \$1,240 to \$3 million. These 109 cases were resolved in the following manner: 11 dismissed for various reasons, 56 to hearing, 20 settled (18 without hearing, 2 after hearing), 1 decided without hearing, and 26 with

¹ Principal omissions from codification were a requirement binding subcontractors and suppliers of contractors to the same extent the contractors were bound to the State on all subcontracts of \$15,000 or more, standardized language concerning arbitration to be placed in all contracts issued by the three State agencies, a requirement that the arbitrator be an attorney or retired judge unless the parties indicate otherwise, and any reference to the determination of rights procedure (which was repealed). Local agencies were authorized to utilize the program by enactment of Government Code §§ 4600 and 4601.

no disposition (3 have been partially or totally heard).

Of the 56 cases that have gone to hearing, 30 have lasted no longer than two days while 26 have taken more than two days each. The average length of hearing for the first group is 1.25 days. The average length of hearing for the second group is eight days, with the longest hearing running 30 days. The average length for all hearings is currently just under 4½ days.

Of the 71 cases which either went to hearing or were settled, the average rate of recovery was 34.74% of the amount originally claimed. The average rate of recovery for 18 cases which were settled² was 33.60%; the average rate of recovery for the 53 cases which were heard and decided was 35.13%. Awards have ranged from \$0 to \$1,192,021.

Under the terms of Public Contract Code § 10240.13, the cost of conducting the arbitration is to be borne equally by the parties (but see discussion below concerning problems in administering the program). These costs are limited to the arbitrator's and court reporter's fees and, on rare occasions, any rental for a hearing site. For cases which took no more than two days of hearing (including those which did not go to hearing at all), the average costs for petitioners (contractors) was \$740.10; the average cost for respondents (public agencies) was \$831.81. For cases taking more than two days of hearing, the average cost for petitioners has been \$5,966.96; the average cost of respondents has been \$6,490.73. The average cost for all petitioners has been \$2,606.83, while the average cost for all respondents has been \$2,852.86. Public Contract Code § 10240.3 provides that the arbitration shall be conducted by a single arbitrator, unless otherwise agreed by the parties. In only one case has there been more than one arbitrator. In that situation the petitioners agreed by stipulation to pay all of the fees charged by the two additional members of a three member arbitration panel.

One of the primary attractions of arbitration is a quicker resolution of disputes when compared to litigation in court. The time frames for the contract arbitration program fit that assessment. Of the 85 cases in which an arbitrator has been selected, an average of just over 4 months has elapsed from the initial demand for arbitration to the date the arbitrator is appointed. Of the 56 cases which have gone to hearing, an average of 12 months elapsed between the initial demand and the start of the hearing (the average is just over 12½ months to completion of hearing). For the 68 cases in which an award or settlement occurred and for which OAH has data, an average of 14 months elapsed between the initial demand and resolution of the dispute. The averages for the start of hearing and resolution categories identified above were increased by Executive Orders issued by former Governor Brown in 1982 and Governor Deukmejian in 1983. Taking these delays into account, OAH estimates that the average length of time to resolve a dispute submitted for arbitration would normally be about 13 months, with hearings starting 10½–11 months following the initial filing.

² The parties did not disclose the amount of settlement in two additional cases.

The amounts at stake and complexity of issues in many of these cases distort any direct comparison with judicial arbitration proceedings (which are usually limited to less complicated claims of no more than \$15,000-\$25,000). However, recent data obtained from Sacramento County provides several reference points. In a sampling of 77 cases awaiting an arbitration hearing (out of an approximately 500 total caseload), an average of 18 months had expired between an initial filing in superior court and the referral to arbitration. An average of an additional 3 months had passed since the referral of these 77 cases to arbitration. In this comparison the construction arbitration program is resolving disputes in a much shorter average time despite the greater complexity of many of the cases.

Public Contract Code § 10240.13 also governs the award of costs (other than of conducting the arbitration), interest, and attorneys fees. To date, costs have been awarded in ten cases, interest in fifteen cases, and attorneys fees in five cases. In a sampling of seven of the ten cases in which costs were awarded, the average amount was \$2,313.71 (ranging from \$362.82 to \$6,454). In the five cases in which attorneys fees were granted, the average amount was \$10,794.47 (ranging from \$1,500 to \$24,200). In all but one case, the award of costs and attorneys fees was in favor of the contractor petitioner and against the public agency respondent.

Public Contract Code § 10240.12 sets forth the limited grounds upon which a decision may be successfully appealed to court, i.e. either it must not be supported by substantial evidence or it must not be decided under or in accordance with California law. To date four arbitration decisions have been appealed to court. One appeal by a contractor was unsuccessful. Of the three appeals by the State, one was denied, a second was granted to correct an erroneous rate of interest, and the third was denied but is being appealed further to appellate court.

Public Contract Code § 10245.4 requires OAH to provide appropriate administrative services, facilities, and fiscal support on behalf of the arbitration program and Arbitration Committee. OAH is required to recover its costs through filing fees imposed for each arbitration. The program is being administered on a part-time basis by a staff attorney and a legal typist. To recover its costs OAH has established a six step sliding fee schedule based on the amount claimed for each arbitration. The schedule was approved by the Arbitration Committee and is subject to periodic review. Recognizing that arbitration is of benefit to both sides in a dispute, OAH requires each party to deposit one-half of the filing fee. Later on, when the parties have selected an arbitrator, estimated the length of hearing, and reserved dates, OAH routinely requests advance deposits for the estimated cost of the hearing.

A typical arbitration case is initiated by a demand. No later than 30 days following the demand, a complaint is due. The respondent then has 30 days to file either an answer or an objection (similar to a demurrer in civil actions). After the complaint is filed, OAH initiates the arbitrator selection process, which is governed by § 321 of the regulations. Once an arbitrator is chosen by the parties, OAH engages him under a personal services contract. The arbitrator may choose to hold a pre-hearing conference. Discovery commences between the parties. Hearing dates are selected

upon mutual agreement of the parties and arbitrator. OAH arranges for a court reporter and, oftentimes, a hearing site. After the hearing is conducted, the arbitrator has 30 days to issue a written decision on the merits, which must contain a summary of the evidence, the reasons underlying the decision, and (unless otherwise agreed by the parties) findings of fact and conclusions of law. The parties have 15 days to file any objections and 20 days to request costs, interest, or attorneys fees. Ultimately, a final award is issued.

The procedure for a typical case under the simplified claims procedure (for claims under \$50,000) differs in the following respects. The arbitration selection procedure is expedited considerably. Only limited discovery within a very brief period is permitted. An initial record of all materials submitted to the public agency at its highest level of review must be prepared and submitted by the agency to the arbitrator. In the approximately six months that this procedure has been available, five contractors have elected to proceed under the simplified approach. No case has been decided so far, so additional data is not yet available.

There have not been many problems in administering the program, but a few areas bear mentioning. First, in six cases, arbitrators have not used the same method of apportioning the costs of hearing. In five of those cases, the arbitrator ordered the public agency respondent to pay most or all of the costs, while in the remaining case the arbitrator ordered the contractor petitioner to pay all of the costs. When queried by OAH, arbitrators in four of the cases stated that their reading of Public Contract Code § 10240.13 permitted an award of hearing costs in a manner other than an equal split between the parties. The result of differing interpretations by arbitrators of this Public Contract Code section is that all parties appearing before the program have not been treated uniformly on this point.

Second, a number of the cases recently filed against local public agencies have resulted in those local agencies strongly contesting OAH's jurisdiction to proceed with arbitration. This problem arises when the local agencies deny that they agreed to utilize the arbitration provisions of Government Code § 4601, where the written agreements between the local agencies and the contractors incorporate by reference provisions of State agency contracts, including language referring to the State Contract Act. If the local agencies do not want to arbitrate but wish to incorporate by reference, the appropriate dispute resolution mechanism should be clearly set forth in the contract. Incorporation by reference had led, so far at least, only to much confusion and potential additional litigation.

Third, the relatively small number of filings over the first five years has not permitted very many arbitrators to develop a strong working knowledge of the mechanics of the program. Only 15 individuals have had an opportunity to hear more than one case. OAH expects this situation will be remedied with increased volume of filings and the passage of time. To date many chosen arbitrators have had prior experience in other adjudicatory forums which they have been able to apply successfully in this program.

Certain positive results should be noted. The length of time involved to resolve disputes through this arbitration program compares quite favorably with the judicial forum. The costs to the parties for participation do not seem excessive, particularly when the adage "time is money" is applied. For example, in the one case involving a three-member panel, the hearing took eight days. The panel took three more days to deliberate on 55 separate claims totaling over \$2 million. Afterwards one member of the panel, a retired judge, estimated the case would have taken four months to try in superior court. There is also greater flexibility in the arbitration process. Hearings have been held at night, on weekends, during holidays, and, on occasion, at the job site which led to the dispute. A mutually agreeable location for hearing can reduce financial expense to each side. Because the proceedings are less formal, some contractors have been able to represent themselves with success. Such examples should increase with the recent addition of the simplified procedure for claims under \$50,000. The parties also have the opportunity to select by mutual agreement an individual who is especially knowledgeable in a particular field. Perhaps the strongest praise for the arbitration program has come from the parties and arbitrators who have participated so far. As OAH indicated in its 1983 Report, the program appears to be working successfully.

VIII. Filings For Fiscal Year 1982/83

<i>Agency</i>	<i>North</i>	<i>South</i>	<i>State</i>
ACCOUNTANCY	5	11	16
AERONAUTICS	0	2	2
ALCOHOLIC BEVERAGE CONTROL	288	494	782
ARCHITECTURAL EXAMINERS	0	1	1
AUTOMOTIVE REPAIR	9	14	23
BARBER EXAMINERS	25	105	130
BEHAVIORAL SCIENCE	8	7	15
CHIROPRACTIC EXAMINERS	5	18	23
COLLECTIONS AGENCY	1	8	9
CONTRACTORS STATE LICENSE BOARD	366	444	810
CONSERVATION (FORESTRY)	7	0	7
CORPORATIONS	7	13	20
COSMETOLOGY	12	39	51
DENTAL EXAMINERS	10	15	25
EDUCATION (CHILD DEVELOPMENT)	22	0	22
ELECTRONIC & APPLIANCE REPAIR	4	3	7
EMPLOYMENT AGENCIES	6	8	14
ENGINEERS	12	8	20
FAIR EMPLOYMENT & HOUSING	50	57	107
FAIR POLITICAL PRACTICES COMMISSION	0	1	1
FOOD & AGRICULTURE	1	2	3
FUNERAL DIRECTORS	3	4	7
HEALTH SERVICES	22	14	36
HORSE RACING BOARD	0	1	1
INSURANCE	73	93	166
INVESTIGATIVE SERVICES	31	78	109
MEDICAL QUALITY ASSURANCE	104	89	193
MOTOR VEHICLES	188	263	451
NURSES (REGISTERED)	77	106	183
NURSING HOME ADMINISTRATORS	0	4	4
OFFICE OF STATEWIDE HEALTH PLANNING	8	7	15
OPTOMETRY BOARD	3	2	5
PHARMACY	13	32	45
PODIATRY	2	2	4
PSYCHIATRIC TECHNICIANS	29	14	43
PSYCHOLOGY EXAMINERS	3	2	5
REAL ESTATE	166	248	414
RETIREMENT—PERS	53	44	97
RETIREMENT—TEACHERS	15	41	56
RETIREMENT—UNIVERSITY OF CALIFORNIA	2	2	4
SECRETARY OF STATE	25	49	74
SOCIAL SERVICES	74	48	122
STRUCTURAL PEST CONTROL	34	41	75
TEACHER PREPARATION & LICENSING	9	14	23
VETERINARY MEDICINE	3	7	10
VOCATIONAL NURSE EXAMINERS	45	84	129
BANKING	1	1	2
HOUSING & COMMUNITY DEVELOPMENT	11	20	31
PHYSICAL THERAPIST	0	1	1
REHABILITATION	1	0	1
TRANSPORTATION	11	0	11
SHORTHAND REPORTERS	3	2	5
JUSTICE	1	0	1
NAVIGATION & OCEAN DEVELOPMENT	0	2	2
INDUSTRIAL RELATIONS	3	0	3
PARKS & RECREATION	1	2	3

VIII. Filings For Fiscal Year 1982/83—Continued

<i>Agency</i>	<i>North</i>	<i>South</i>	<i>State</i>
HEARING AID	0	2	2
PHYSICIAN'S ASSISTANT	0	2	2
SUPERINTENDENT OF PUBLIC INSTRUCTION	0	1	1
ACUPUNCTURE	1	0	1
TOTAL STATE AGENCIES	1,853	2,572	4,425
SCHOOLS:			
CLASSIFIED EMPLOYEES	16	2	18
COMMUNITY COLLEGE (FACULTY) (for cause)	1	6	7
PROBATIONARY TEACHERS	204	129	333
TEACHER GRIEVANCE	0	0	0
STUDENTS (discipline/grievance)	2	3	5
TENURED TEACHERS	27	37	64
COLLEGE FACULTY MISCELLANEOUS	0	0	0
TOTAL SCHOOLS	250	177	427
CITY & COUNTY	121	12	133
COMMUNITY HOSPITALS	0	0	0
S.F. RETIREMENT	10	0	10
TOTAL LOCAL GOVERNMENT	131	12	143
TOTAL ALL AGENCIES	2,234	2,761	4,995

IX. Filings For Fiscal Year 1983-84

Agency	North	South	State
ACCOUNTANCY	7	15	22
AERONAUTICS	0	5	5
ALCOHOLIC BEVERAGE CONTROL	239	539	778
ARCHITECTURAL EXAMINERS	1	0	1
AUTOMOTIVE REPAIR	4	6	10
BARBER EXAMINERS	2	49	51
BEHAVIORAL SCIENCE	7	5	12
CHIROPRACTIC EXAMINERS	8	15	23
COLLECTIONS AGENCY	1	8	9
CONTRACTORS STATE LICENSE BOARD	364	408	772
CONSERVATION (FORESTRY)	5	0	5
CORPORATIONS	6	15	21
COSMETOLOGY	8	23	31
DENTAL EXAMINERS	13	15	28
EDUCATION (CHILD DEVELOPMENT)	30	3	33
ELECTRONIC & APPLIANCE REPAIR	3	23	26
EMPLOYMENT AGENCIES	1	4	5
ENGINEERS	3	4	7
FAIR EMPLOYMENT & HOUSING	41	79	120
FAIR POLITICAL PRACTICES COMMISSION	0	0	0
FOOD & AGRICULTURE	4	0	4
FUNERAL DIRECTORS	0	5	5
HEALTH SERVICES	6	18	24
HORSE RACING BOARD	0	2	2
INSURANCE	25	60	85
INVESTIGATIVE SERVICES	17	51	68
MEDICAL QUALITY ASSURANCE	98	116	214
MOTOR VEHICLES	166	252	418
NURSES (REGISTERED)	93	91	184
NURSING HOME ADMINISTRATORS	1	10	11
OFFICE OF STATEWIDE HEALTH PLANNING	11	6	17
OPTOMETRY BOARD	1	4	5
PHARMACY	15	38	53
PODIATRY	0	2	2
PSYCHIATRIC TECHNICIANS	27	9	36
PSYCHOLOGY EXAMINERS	1	1	2
REAL ESTATE	117	132	249
RETIREMENT—PERS	31	38	69
RETIREMENT—TEACHERS	24	40	64
RETIREMENT—UNIVERSITY OF CALIFORNIA	8	2	10
SECRETARY OF STATE	16	44	60
SOCIAL SERVICES	56	56	112
STRUCTURAL PEST CONTROL	17	38	55
TEACHER PREPARATION & LICENSING	7	15	22
VETERINARY MEDICINE	3	4	7
VOCATIONAL NURSE EXAMINERS	23	67	90
MISCELLANEOUS AGENCIES	23	6	29
CEMETERY BOARD	1	0	1
OSTEOPATHIC EXAMINERS	1	3	4
HOUSING & COMMUNITY DEVELOPMENT	11	20	31
HEARING AID DISPENSER	3	0	3
PHYSICIAN'S ASSISTANTS	3	0	3
ACUPUNCTURE	3	0	3
PHYSICAL THERAPIST	1	0	1
SHORTHAND REPORTERS	1	4	5

IX. Filings For Fiscal Year 1983-84—Continued

<i>Agency</i>	<i>North</i>	<i>South</i>	<i>State</i>
PRIVATE INVESTIGATORS	1	0	1
TOTAL STATE AGENCIES	1,558	2,350	3,908
SCHOOLS:			
CLASSIFIED EMPLOYEES	8	1	9
COMMUNITY COLLEGE (FACULTY) (for cause)	0	2	2
PROBATIONARY TEACHERS	64	33	97
TEACHER GRIEVANCE	0	6	6
STUDENTS (discipline/grievance)	1	2	3
TENURED TEACHERS	25	21	46
COLLEGE FACULTY MISCELLANEOUS	2	1	3
TOTAL SCHOOLS	100	66	166
CITY & COUNTY	160	4	164
COMMUNITY HOSPITALS	0	0	0
TOTAL LOCAL GOVERNMENT	160	4	164
TOTAL ALL AGENCIES	1,818	2,420	4,238